



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

the correctness of the decision depends on whether the legislature intended to restrict these words to their legal significance, or to apply them in their ordinary meaning. Since the statute in question is a highly penal statute under which the judge might sentence to twenty years imprisonment, it would seem that the words should be restricted to their legal significance, and the case is therefore correct.

L. P. S.

JUDGMENTS BY CONFESSION.—WHEN A POWER OF ATTORNEY TO CONFESS JUDGMENT IS *Functus Officio*.—In *Borough of Bellevue vs. Hallett*,¹ the grantee of a power of attorney to confess judgment proceeded to have judgment entered. He filed a statement of claim but neglected to file a formal confession of judgment. For this reason the judgment was subsequently stricken off upon motion. A second judgment was then filed, regular in every particular. But upon a motion to strike off, this judgment was also nullified on the ground that the entry of the first judgment, despite its irregularity, was an exhaustion of the power of attorney: “. . . this court, after argument and due consideration, made absolute the rule to strike off the first judgment. . . . True, this was done because of irregularities appearing on the face of the record; but the power authorized by the warrant had nevertheless been exhausted. We cannot breathe into it the breath of life, in view of the unbroken line of decisions sustaining this construction” On appeal the Supreme Court of Pennsylvania in a short *per curiam* opinion, affirmed the rules of the trial court.

The courts are unanimously of opinion that after a valid judgment has been confessed under a power of attorney, the power is *functus officio*. Accordingly where judgment has been entered in one state under a power of attorney, it cannot subsequently be entered in another state on the same warrant.² Even “if the warrant had been to confess a judgment or judgments, in the plural, it seems that a second judgment could not be entered until the first judgment had been reversed or set aside.” And in a number of Pennsylvania cases it has been determined that after a warrant has been exercised by a confession of judgment in one county, a subsequent judgment cannot be entered under the same power in another county.³ Similarly it was held in *Campbell vs. Canon*⁴ that where a year and a day was allowed to elapse without execution upon a judgment by confession, a second judgment could not be entered

¹ 83 Atl. Rep. (Penna. 1912).

² *Manufacturers and Mechanics' Bank v. Cowden et al.*, 3 Hill (N. Y.) 461 (1842).

³ *Livezey v. Pennock*, 2 Browne 321 (1813); *Ely v. Karmany*, 23 Pa. 314 (1854); *Ulrich v. Voneida*, 1 P. and W. 245 (1830); *Martin v. Rex*, 6 Sergeant and Rawle 296 (1820); *Neff v. Barr*, 14 S. and R. 166 (1826).

⁴ *Addison* (Pa.) 267 (1795).

under the same power of attorney, even though the first judgment could be revived by a *scire facias*. The "warrant of attorney authorized the entry of only one judgment, and was satisfied by the entry of the first judgment." Likewise after judgment has been recovered before a justice of the peace on a judgment note, the warrant of attorney therein is *functus officio*, and no judgment can be entered thereon in the common pleas.⁵ And obviously, where a judgment in one county is but a transcript of the record of a judgment by confession in another, the two judgments fall together when the original judgment is stricken off.⁶

On the other hand it has been held in a Delaware case⁷ that an attempt to enter judgment under a warrant of attorney in the name of the obligee in a bond several terms of court after his death, was so utterly inconsistent with the power conferred that it must be considered "a total failure to execute the warrant, and an absolute nullity in the contemplation of law." Accordingly a subsequent judgment, entered in the name of the obligee's administrator, was allowed to stand. And there can be no doubt that where an entry of judgment is absolutely void, it has not exhausted the power of attorney authorizing it.

The cases which cannot be so readily justified have arisen where the power of attorney was irregularly exercised and therefore voidable as against the grantor of the power. Can a second judgment be entered under the same power after the first judgment has been set aside? The Pennsylvania courts have answered this question negatively. In *Osterhout vs. Briggs*⁸ it was held that where judgment on a judgment note is irregular because of its premature entry, the power of attorney is nevertheless *functus officio*. A second judgment, regularly entered, will therefore be stricken off together with the premature judgment. The first judgment "it is true was irregular and voidable at the instance of the defendant only, but it was not absolutely void, and as against parties other than the defendants, it was not even voidable." And in *Philadelphia vs. Johnson*⁹, in which similar facts were before the court, Judge Smith of the Superior Court said: "A power exists in law only for some purpose, and when fully executed by the accomplishment of its purpose it is exhausted. The authority given by it ends when nothing remains to be done in pursuance of it. It may even be exhausted without being executed, when its purpose has been otherwise accomplished." And again: "It was not a case of an imperfect execution of the power, but of a perfect execution, with its

⁵ *Dixon v. Miller*, 20 Pa. C. C. 335 (1897).

⁶ *Banning v. Taylor*, 24 Pa. 297 (1855).

⁷ *Guyer's Administrator v. Guyer*, 6 Houst. 431 (1880). *Accord*: *Kellerman v. Kerst*, Phila. C. P. No. 2, Dec. T. 1900, 634, unreported.

⁸ 37 Sup. Ct. 169 (1908).

⁹ 23 Sup. Ct. 591 (1903), affirmed *per curiam* in 208 Pa. 645 (1904).

effect liable to be defeated through matters not entering into the act of execution."¹⁰

Whether or not the argument in these cases, and the conclusion which it compels, are sound, depends entirely upon the nature and purpose of a power of attorney to confess judgment. If by giving such a power, the grantor merely endows his attorney with the privilege of perfunctorily executing certain formalities, there can be no difference of opinion with reference to the court's conclusion that, once the formalities have been accomplished, however barren of result, the power has been exhausted. Moreover, if this is the true purpose of a power of attorney to confess judgment, there can be no distinction between a void execution, and an execution merely voidable. For in both instances the outward forms have been executed. But it is difficult to believe that the parties to a warrant of attorney ever regard it as no more than a grant of the right to execute certain formal technicalities. It is submitted that the grantor of a power of attorney to confess judgment intends to enable his grantee to avail himself of a substantial, not merely a formal, remedy against him without a court trial. That being true, how can the power be said to be *functus officio* until a judgment of full validity has been entered against the grantor of the power? Accepting Judge Smith's statement that "The authority given by it ends when nothing remains to be done in pursuance of it," can it be said that nothing remains to be done until a judgment, regular in every particular, has been entered? Indeed it would seem that the reasoning in the Pennsylvania cases cited cannot be sustained if judgments by confession are not to be deemed wholly artificial in the eyes of the law. Certainly form and substance are not given the relative importance which modern legal thought accords them.

What has been said applies in cases where the first judgment is voidable as against the defendant only, as in *Osterhout vs. Briggs* and *Philadelphia vs. Johnson*, *supra*. But its force is even more patent in the principal case where the judgment was wholly irregular as well against third parties as against the grantor of the power.¹¹

¹⁰ See also *Commonwealth v. Massi*, 225 Pa. 548 (1909) in which *Philadelphia v. Johnson*, *supra*, and *Osterhout v. Briggs*, *supra*, are re-affirmed in an opinion by Mr. Justice Potter.

¹¹ That this is probably the law seems a reasonable deduction from the cases. *Weaver v. McDevitt*, 21 Sup. Ct. 597 (1902) presents the necessity of having a formal confession on the record. See also *Lytle v. Colts*, 27 Pa. 193 (1856). In *Summy v. Hiestand*, 65 Pa. 300 (1870) Judge Sharswood points out that the mere failure to enter a judgment on the record "May perhaps endanger the lien of it as to third persons; but as between the parties there is a valid final judgment of record." But in the principal case, the Supreme Court apparently approved the lower court's action in striking off the judgment at the instance of the defendant for the reason that the formal confession had not been entered up. Hence failure to enter the judgment would appear to stamp it as irregular as against all parties concerned.

The view taken in this note is substantiated by the Supreme Court of Iowa in *Huner vs. Doolittle*.¹² The reversal of the first decree, it was held, "placed the case and the rights of the parties the same as if the first decree had not been rendered. The intention of the power had not been carried out, consequently the object was not accomplished, and the authority was not exhausted by the first act." And a similar opinion was intimated by Judge Washington, sitting in the United States Circuit Court, in *Fairchild vs. Camac*.¹³

Much may be said against the desirability of permitting judgments by confession to be entered under powers of attorney in any case. Indeed in England today the practice of taking judgment in this way is almost obsolete.¹⁴ But where the practice still prevails, there is scant justification for a rule of law which permits the intention of the parties to be defeated by a barren technicality.

W. A. S.

LEGAL ETHICS.—The following questions were recently answered by the New York County Lawyers' Association Committee on Legal Ethics:

I. QUESTION:

Is it proper professional conduct for attorneys to solicit employment by the use of literature such as that annexed hereto?

"Dear Sir:

We submit to you herewith a form Retainer setting forth the plan under which we are employed as attorneys and general counsel by many large and small firms and corporations.

We would appreciate the privilege of an appointment with you at your office or ours, to explain the moderate terms and the advantages of this arrangement.

Yours very truly,

.....

RETAINER.

Dear Sirs:

We hereby retain you as our attorneys and general counsel in New York City in connection with any and all legal matters which we may refer to you, for the term of years from the date hereof, at an annual compensation for all legal services hereunder of dollars (\$), payable in equal quarterly installments at the end of each quarter-year.

We understand that within the term hereof we are to have the right to call upon you for all legal services of every kind and nature in and about our regular business, including all matters of litigation and negotiation, and we are to have the privilege of consultation and advice at all reasonable times.

¹² 3 Greene 76 (1851).

¹³ 8 Fed. Cas. No. 4610; 3 Wash. C. C. 558 (1819).

¹⁴ 18 Halsbury's "The Laws of England," 190.